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The Claim is Cognizable but the Petition is Untimely: The Pennsylvania Supreme Court's Recent Collateral Relief Decisions

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THE CLAIM IS COGNIZABLE BUT THE PETITION IS UNTIMELY: THE PENNSYLVANIA SUPREME COURT'S RECENT COLLATERAL RELIEF DECISIONS

by THOMAS M. PLACE*

INTRODUCTION

A standard feature of state criminal procedure today is a system of post-conviction review separate from the right a defendant has to challenge his conviction or sentence by direct appeal. In the 1950s and 60s, post-conviction review procedures had developed in response to United States Supreme Court decisions holding that states must afford prisoners a mechanism for raising claims that their state court convictions violated constitutionally protected rights.[1] Initially, some states judicially construed their writ of habeas corpus as a means of providing a post-conviction remedy,[2] while others expanded the writ of coram nobis.[3] Beginning in the 1950s, other states enacted comprehensive post-conviction procedures that were either influenced by the ABA Standards Relating to Post Conviction Remedies,[4] which recommended a single, unitary post-conviction remedy or were modeled after the Uniform Post Conviction Procedure Act.[5]

Prior to 1966, collateral relief in Pennsylvania was limited to the writ of habeas corpus[6] and, to a lesser extent, the writ of coram nobis.[7] The

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1. *See Mooney v. Holohan*, 294 U.S. 103 (1934); *Young v. Regen*, 337 U.S. 235 (1949); *Case v. Nebraska*, 381 U.S. 336 (1965).

2. *See e.g. Rice v. Davis*, 366 S.W.2d 153 (Ky. 1963); *Ex parte Bush*, 313 S.W.2d 287 (1958); *Huffman v. Alexander*, 251 P.2d 87 (1952); *Sewell v. Lainson*, 57 N.W.2d 556 (1953).

3. *See e.g. People v. Monahan*, 217 N.E.2d 664 (1966); *In re Chapman*, 273 P.2d 817 (1954); *State ex rel. McManamon v. Blackford Circuit Court*, 95 N.E.2d 556 (1950). *See also* Richard B. Amandes, *Coram Nobis - Panacea or Carcinoma*, 7 Hastings L.J. 48 (1955); Edwin W. Briggs, *Coram Nobis*, 17 Mont. L. Rev. 160 (1956).

4. *See* Standards Relating to Post-Conviction Remedies (ABA 1967).

5. *See* Uniform Post-Conviction Procedures Act (1955); *see e.g.* Md. Ann. Code, art. 27 § 645A-645J; Minn. S.A. § 590.01-590.06 (1967); Mont. C.A. 46-21-101 to 46-21-203; Ore. Rev. Stat. § 138.510-138.680 (1968). *See also* Meador, *Accommodating State Criminal Procedure and Federal Post Conviction Review*, 50 A.B.A. J. 928, 929-30 (1964).

6. *See* Pa. Const. art. I, § 14. For a discussion of common law habeas corpus in Pennsylvania, see *Commonwealth ex rel. Stevens v. Myers*, 213 A.2d 613, 619-23 (Pa. 1965).

7. *See e.g. Commonwealth v. Orsino*, 178 A.2d 843, 846 (Pa. 1962) (stating purpose of writ of coram nobis is to correct errors of fact only); *Commonwealth v. Fay*, 439 A.2d 1227, 1228-29 (Pa. Super. 1982) (explaining expansion of scope of writ of coram nobis in Pennsylvania to include matters of law not previously before court); *Commonwealth v. Ditmore*, 363 A.2d 1253,

Pennsylvania Supreme Court called for legislation establishing a "process for hearing and determining alleged violations of federal constitutional guarantees" in response to a significant increase in the number of post-conviction challenges in the mid-1960s and the lack of a uniform process to hear and decide such claims.[8] In 1966, the legislature enacted the Post Conviction Hearing Act ("PCHA").[9] The PCHA encompassed habeas corpus and coram nobis and provided a comprehensive procedure to hear and decide challenges to convictions obtained and sentences imposed "without due process of law."[10]

In 1988, the PCHA was modified in part, repealed in part, and renamed the Post Conviction Relief Act ("PCRA").[11] Significant amendments to the PCRA were enacted in 1995[12] including the requirement that, subject to several narrow exceptions, a post-conviction petition must be filed within a year of the date a defendant's judgment becomes final.[13] As amended,[14] the PCRA restricts collateral relief to "persons convicted of crimes they did not commit and persons serving illegal sentences."[15] In contrast to the PCHA, which permitted a defendant to raise a number of specific constitutional challenges to his or her conviction or sentence,[16] the PCRA only allows a court to consider claims of constitutional error that so undermine "the truth-determining process that no reliable adjudication of guilt or innocence could

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1256 (Pa. Super. 1976) (emphasizing traditional limited scope of writ of coram nobis).

8. *Myers*, 213 A.2d at 619-20.

9. *See* Pa. Laws 1580, 1580-84 (codified at 19 Pa. Consol. Stat. §§ 1180-1 to 1180-12, and recodified as amended at 42 Pa. Consol. Stat. §§ 9541-9551(1982)). Sections 9547 to 9551 of the PCHA were repealed in 1988. *See* 1988 Pa. Laws 336. The 1988 amendments substituted "relief" for "hearing" in the statute's title. *Id.* at § 3. *See* Elizabeth L. Green, Student Author, *Habeas Corpus and the 1966 Post Conviction Hearing Act: Major Pennsylvania Remedies in Criminal Cases*, 39 Temple L.Q. 188, 203-06 (1966) (summarizing changes in habeas corpus law under PCHA). The current version of the Post Conviction Relief Act is codified at 42 Pa. Consol. Stat. §§ 9541-46 (1998).

10. 42 Pa. Consol. Stat. § 9542 (repealed 1988).

11. *See* 1988 Pa. Laws 336; 42 Pa. Consol. Stat. §§ 9541-46 (West 1988).

12. *See* 1995 Pa. Laws 1118 (became effective January 16, 1996). The amendments also established the Capital Unitary Review Act, which replaced post appeal collateral review in capital cases. On August 11, 1997, the Pennsylvania Supreme Court permanently suspended Sections 9570 to 9579 of the Capital Unitary Review Act pursuant to its authority under Article V, Section 10 of the Pennsylvania Constitution. The Court also suspended Section 9545(c)(3), relating to limitations periods where a stay of execution is granted, Section 9545(d)(2), relating to discovery, and the 1995 and 1997 amendments to Section 9546(a) of the PCRA concerning review of orders in death penalty cases. *In Re: Suspension of the Capital Unitary Review Act and Related Sections of the Act of 1995-32 (SSI)*, 722 A.2d 676, 678-79 (Pa. 1999).

13. *See* 42 Pa. Consol. Stat. § 9545(b) (West 1998).

14. The Superior Court has rejected challenges to the validity of the 1995 Amendments based on allegations that the legislation exceeded the scope of the Governor's proclamation of designated subjects to be addressed during the 1995 Special Session. In doing so, the court reasoned that the legislature's consideration of the PCRA statute was proper in light of the Governor's proclamation seeking revisions of the criminal statutes of the Commonwealth. *See Commonwealth v. Sanders*, 743 A.2d 970, 973 (Pa. Super. 1999).

15. 42 Pa. Consol. Stat. § 9542 (West 1998) (repealed 1988).

16. *See* 42 Pa. Consol. Stat. § 9543(a)(3) (West 1998) (repealed 1988).

have taken place."[17] Furthermore, the PCRA precludes relief for claims that have been previously litigated on direct appeal or raised in a previously filed post-conviction petition.[18] The PCRA also denies relief for claims that have been waived,[19] namely claims that could have been raised at or before trial, on appeal, or in a prior post-conviction proceeding, but were not.[20]

This note examines a number of recent Pennsylvania Supreme Court decisions construing the provision of the PCRA that authorizes relief for violations of the state or federal constitution only where the defendant establishes that such constitutional violation "undermined the truth determining process . . . ."[21] In addition, this note discusses decisions concerning the one-year time-for-filing requirement and its relationship to habeas corpus. More specifically, Section I considers when lawyer error undermines "the truth-determining" process. It examines *Commonwealth v. Kimball*,[22] where the Pennsylvania Supreme Court held that the PCRA does not impose a more stringent prejudice requirement than that applicable when ineffectiveness of counsel is considered on direct appeal.[23] Section I argues that, while the holding in *Kimball* is correct, the Court used unnecessarily broad language in seeking to reconcile the tension in the *Strickland* line of cases between outcome determination and reliability of the verdict in determining prejudice.[24] The result, this note argues, is that the Pennsylvania standard for ineffectiveness, both on direct appeal and in a collateral proceeding, arguably no longer tracks the federal standard because it does not take into account certain forms of lawyer error that do not undermine the reliability of the proceeding, even though the result of the proceeding would have been different but for the lawyer's conduct.[25] Section I also discusses a recent decision holding that counsel's failure to protect the right to direct appeal implicates the "truth-determining" process entitling a defendant to collateral relief.[26] The section concludes with an argument that lawyer error that deprives a defendant of discretionary review should likewise entitle a defendant to collateral relief.[27]

Section II considers the one-year time limit for filing a post-conviction petition and reviews a recent Pennsylvania Supreme Court decision holding the time limit to be jurisdictional.[28] Section II sets out an argument for construing the time period as a statute of limitations thereby permitting the late filing of petitions when extraordinary circumstances preclude compliance

17. 42 Pa. Consol. Stat. § 9543(a)(2)(1) (West 1998).
18. *See* 42 Pa. Consol. Stat. § 9543(a)(3) (repealed 1988); 42 Pa. Consol. Stat. § 9544(b).
19. *See* 42 Pa. Consol. Stat. § 9543(a)(3) (repealed 1988); 42 Pa. Consol. Stat. § 9544(b).
20. *See* 42 Pa. Consol. Stat. § 9543(a)(3) (repealed 1988); 42 Pa. Consol. Stat. § 9544(b).
21. 42 Pa. Consol. Stat. § 9543(a)(2)(i).
22. 724 A.2d 326 (1999).
23. *See id.* at 332.
24. *See infra* Section I.
25. *See id.*
26. *See id.*
27. *See id.*
28. *See infra* Section II.

with the one-year time period.[29] This note argues that, even as a jurisdictional bar where extraordinary circumstances prevent the timely filing of a petition, a court has the inherent power to treat the petition as timely filed under the *nunc pro tunc* doctrine.[30] In addition, this note argues that where post-conviction relief is sought to correct an illegal sentence, a court has authority to grant relief notwithstanding the fact that the post-conviction petition is not timely filed.[31] Section II further notes the potential conflict between the time-for-filing requirement as a jurisdictional bar and the court's recent decision holding that a defendant has an enforceable right to effective counsel in a post-conviction proceeding.[32] This note argues that where counsel's performance in a post-conviction proceeding is raised beyond the one-year filing period as it will normally be, in order to provide the defendant a remedy, ineffectiveness of the counsel should be considered an extraordinary circumstance permitting the late filing of a second or subsequent petition.[33] Finally, Section II examines recent decisions denying habeas corpus relief where a PCRA petition is not timely filed.[34] This note argues that the time limit acts as an unconstitutional suspension of the writ of habeas corpus.[35] By construing the time-for-filing provision as jurisdictional, the Court precludes consideration of an untimely petition without regard to the reasons for its untimeliness. Construed in this manner, the one-year filing requirement is not a "reasonable restriction" on a constitutionally guaranteed right.

I. THE COURT EXPANDS PCRA RELIEF BY BROADLY DEFINING WHEN A CLAIM UNDERMINES THE TRUTH-DETERMINING PROCESS

The PCRA limits the grounds upon which post-conviction relief may be granted. A violation of the Pennsylvania Constitution or the Constitution or laws of the United States will entitle a defendant to relief only when, in the circumstances of the particular case, the violation so "undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place."[36] Ineffective assistance of counsel claims are likewise limited under the PCRA to claims that counsel's ineffectiveness undermined "the truth-determining process."[37] Prior to recent Pennsylvania Supreme Court decisions, the "truth-determining process" had been narrowly defined to exclude claims of error arising during capital sentencing proceedings[38] on

29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.*
36. 42 Pa. Consol. Stat. § 9543(a)(2)(i) (West 1998).
37. 42 Pa. Consol. Stat. § 9543(a)(2)(ii) (West 1998).
38. *Commonwealth v. Lantzy*, 712 A.2d 288, 289 (Pa. Super. 1998).

direct appeal,[39] on discretionary review,[40] and during post-conviction proceedings.[41] Excluding direct appeal from the "truth determining process" led the Superior Court to hold that where a defendant claimed counsel's conduct deprived him of his right to appeal, but did not "affect the underlying verdict,"[42] the defendant could seek relief through a request for *nunc pro tunc* outside the framework of the PCRA. With respect to counsel's performance at trial, a significant question existed as to whether the PCRA mandated a more demanding standard of prejudice than when lawyer error was considered on direct appeal.[43] It was against this background of decisions, that narrowed the scope of post-conviction relief and created a parallel system of review, that the Pennsylvania Supreme Court undertook review of the cases discussed below.

A. When Lawyer Error Undermines the Truth Determining Process

The Pennsylvania Supreme Court articulated the standard for evaluating claims of ineffective assistance of counsel raised on direct appeal in *Commonwealth v. Pierce*.[44] The *Pierce* Court considered whether its standard for ineffective assistance of counsel set out in *Commonwealth ex rel. Washington v. Maroney*[45] required a reviewing court to find that counsel's act or omission prejudiced the defendant as that term was used by the United States Supreme Court in *Strickland v. Washington*[46].[47] Although *Maroney* and other decisions suggested that a defendant was prejudiced whenever counsel acted unreasonably, the *Pierce* Court concluded that a defendant claiming ineffectiveness had always been required to demonstrate both inadequate performance and prejudice in order to obtain relief.[48] Accordingly, the *Pierce* Court held that the standard of ineffectiveness set out in *Strickland* and the Pennsylvania test for ineffectiveness constitute the same rule.[49]

In post-*Pierce* cases, Pennsylvania courts uniformly considered ineffectiveness claims presented on direct appeal pursuant to a three-prong performance and prejudice test.[50] Prongs one and two concern the lawyer's performance. Under this test, the defendant must establish that the

39. *See id.*

40. *See Commonwealth v. Tanner*, 600 A.2d 201, 205 (Pa. Super. 1991).

41. *See Commonwealth v. Christy*, 656 A.2d 877, 881 (Pa. 1995) (stating that ineffectiveness of counsel can be basis for post-conviction relief only if the defendant enjoys a constitutional right to counsel at the proceeding where the claimed ineffectiveness occurred).

42. *Lantzy*, 712 A.2d at 291.

43. *See Commonwealth v. Buehl*, 658 A.2d 771, 777 (Pa. 1995).

44. 527 A.2d 973 (Pa. 1987).

45. 235 A.2d 349 (Pa. 1967), *overruled, Pierce*, 527 A.2d 973 .

46. 466 U.S. 668 (1984).

47. *See Pierce*, 527 A.2d at 974.

48. *Id.* at 976.

49. *Id.*

50. *See e.g. Commonwealth v. Douglas*, 645 A.2d 226, 230 (Pa. 1994); *Commonwealth v. Rollins*, 580 A.2d 744, 748 (Pa. 1990); *Commonwealth v. Durst*, 559 A.2d 504, 505 (Pa. 1989).

underlying claim of ineffectiveness has arguable merit[51] and that counsel's act or omission was not reasonably designed to effectuate his client's interest.[52] The third prong, known as the prejudice prong, requires the defendant to establish that "but for counsel's act or omission, the outcome of the proceeding would have been different."[53]

As noted, the PCRA requires a defendant seeking relief on grounds of ineffectiveness of counsel to prove that counsel's act or omission "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place."[54] Shortly after the enactment of the PCRA, the Superior Court in *Commonwealth v. Thomas*,[55] held that the provision of the PCRA governing relief on the basis of ineffectiveness of counsel "is a substantial restriction of the grounds for post-conviction collateral relief in Pennsylvania."[56] A defendant seeking post-conviction relief on the grounds that counsel was ineffective was required to show more than "some prejudice" to be entitled to relief.[57] Rather, the PCRA, the court

51. *See e.g. Commonwealth v. Borders*, 560 A.2d 758, 759 (Pa. 1989) (finding arguable merit to defendant's ineffectiveness claim where counsel ignores evidence that puts in question credibility of witness); *Commonwealth v. Penrose*, 669 A.2d 996, 1000 (Pa. Super. 1995) (finding arguable merit to defendant's ineffectiveness claim that counsel's failure to object to jury being permitted to review defendant's written confession during deliberations conflicted with Pa. R. Crim. P. 1114), *appeal denied*, 681 A.2d 1342 (Pa. 1996); *Commonwealth v. Legg*, 669 A.2d 389, 391 (Pa. Super. 1995) (finding arguable merit to defendant's ineffectiveness claim where counsel ignores available and admissible evidence tending to establish a viable defense), *rev'd on other grounds*, 711 A.2d 430 (Pa. 1998); *Commonwealth v. Polston*, 616 A.2d 669, 680 (Pa. Super. 1992) (finding arguable merit to defendant's ineffectiveness claim that videotape testimony violated defendant's right to confront witnesses), *appeal denied*, 626 A.2d 1157 (Pa. 1993); *Commonwealth v. Gainer*, 580 A.2d 333, 337 (Pa. Super. 1990) (finding failure to seek alibi instruction conflicted with established law), *appeal denied*, 602 A.2d 856 (Pa. 1992); *Commonwealth v. Nelson*, 574 A.2d 1107, 1114 (Pa. Super. 1990) (finding arguable merit to defendant's ineffectiveness claim where counsel had no reasonable basis for failing to seek suppression of a confession where *Miranda* warnings had not been provided).

52. *See e.g. Commonwealth v. Peterkin*, 649 A.2d 121, 127 (Pa. 1994) (finding counsel's strategy to concede some points in closing argument while concentrating on more important issues reasonable), *cert. denied*, 515 U.S. 1137 (1995); *Commonwealth v. Griffin*, 644 A.2d 1167, 1173 (Pa. 1994) (finding counsel's decision not to submit *voir dire* questions on racial bias reasonable); *Commonwealth v. Blackwell*, 647 A.2d 915, 923-924 (Pa. Super. 1994) (finding counsel's strategy to advise the defendant to enter plea where going to trial would have exposed the defendant to a possible death sentence reasonable), *appeal denied*, 655 A.2d 509 (Pa. 1995); *Commonwealth v. Cummings*, 619 A.2d 316, 318 (Pa. Super. 1993) (finding trial counsel's decision to defend on the basis of provocation rather than insanity reasonable where defendant's confession supported provocation defense), *appeal denied*, 631 A.2d 1004 (Pa. 1993); *Commonwealth v. Fluharty*, 632 A.2d 312, 318 (Pa. Super. 1993) (finding counsel's decision not to object to defective guilty plea colloquy reasonable in light of favorable plea bargain); *Commonwealth v. Hart*, 565 A.2d 1212, 1220 (Pa. Super. 1989) (finding counsel's decision not to elect alternative jury charge reasonable as charge given could have worked to defendant's advantage if jury deadlocked on murder verdict), *appeal denied*, 581 A.2d 569 (Pa. 1990).

53. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

54. 42 Pa. Consol. Stat. § 9543(a)(2)(ii).

55. 578 A.2d 422 (Pa. Super. 1990).

56. *Id.* at 425.

57. *See id.*

held, required the defendant to prove that counsel's act or omission so affected the trial itself that the result of the trial is inherently unreliable.[58]

In decisions following *Thomas*, the Superior Court analyzed ineffectiveness claims presented in post-conviction appeals according to a "two step"[59] process or pursuant to a three-prong standard with a PCRA element[60] standard. While both tests and the PCRA appear to impose a more demanding standard than when the ineffectiveness of counsel is raised on direct appeal, the Superior Court has given relief under the PCRA when counsel's act or omission would also satisfy the direct appeal standard.[61]

The question of whether the PCRA requires a defendant to satisfy a more demanding standard than when ineffectiveness is considered on direct appeal was initially considered by the Pennsylvania Supreme Court in *Commonwealth v. Buehl*.[62] In *Buehl*, the three Justices of an evenly divided Court held that the *Pierce/Strickland* standard did not govern ineffectiveness claims raised in a post-conviction proceeding. Rather, those Justices concluded that the PCRA "renders more stringent the prejudice requirement which must be satisfied before relief can be granted."[63] This heightened prejudice, the Justices concluded, served as an "additional substantive requirement which must be proved"[64] before post-conviction relief could be granted. The Court found that counsel's failure to request a cautionary instruction with regard to certain evidence satisfied the *Pierce/Strickland* standard because it could not "be said . . . different."[65] The Court concluded that the defendant was nonetheless not entitled to post-conviction relief because counsel's ineffectiveness did not undermine the reliability of the verdict given the "overwhelming evidence" of the defendant's guilt.[66]

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58. *See id.*

59. *See Commonwealth v. Grier*, 599 A.2d 993, 994 (Pa. Super. 1991) (applying two-step analysis to petition for post-conviction relief), *appeal denied*, 607 A.2d 250 (Pa. 1992); *Commonwealth v. Wolfe*, 580 A.2d 857, 859 (Pa. Super. 1990) (discussing two-step analysis), *appeal denied*, 612 A.2d 985 (Pa. 1992).

60. *See Buehl*, 658 A.2d at 777 (stating the test as a three-prong test and added the PCRA element); *Penrose*, 669 A.2d at 999 (same), *appeal denied*, 681 A.2d 1342 (Pa. 1996).

61. *See e.g. Commonwealth v. Correa*, 664 A.2d 607, 612 (Pa. Super. 1995) (finding that no reliable adjudication of guilt or innocence was possible), *appeal denied*, 678 A.2d 364 (Pa. 1996); *Thomas*, 578 A.2d at 429 (determining that confidence in verdict was undermined); *Commonwealth v. Nelson*, 574 A.2d 1107, 1114-15 (Pa. Super. 1990) (stating that no reliable adjudication of guilt or innocence was possible).

62. 658 A.2d 771 (Pa. 1995).

63. *Id.* at 777.

64. *Id.* at 777 n. 5.

65. *Id.* at 779.

66. *Id.* at 782, 783. Justice Cappy, joined by then Justice, now Chief Justice Flaherty, dissented on the basis that there was no substantive difference between the *Pierce/Strickland* standard and the language in the PCRA governing claims of ineffective assistance of counsel. The dissent noted that both the *Pierce/Strickland* standard and the PCRA required a defendant to prove that counsel's act or omission undermined the reliability of the verdict. The dissent also argued that a heightened prejudice standard was at odds with a defendant's right to effective counsel and would create a post-conviction system in which relief is provided to defendants who establish ineffectiveness of trial counsel on direct appeal but denied to defendants who are required to seek post-conviction relief because of ineffectiveness of both trial and appellate

The Pennsylvania Supreme Court returned to the question of the standard governing post-conviction allegations of ineffectiveness of counsel in *Kimball*.[67] The *Kimball* Court reviewed an *en banc* decision of the Superior Court holding that the defendant was entitled to post-conviction relief by reason of counsel's failure to cross-examine a key Commonwealth witness. The Court reversed the Superior Court's holding that Kimball had not been denied his right to effective counsel and was, therefore, not entitled to post-conviction relief. However, Justice Newman, writing for the Court, declined to follow *Buehl* and held that the same standard that governs ineffectiveness claims presented on direct appeal applies where ineffectiveness is asserted as a basis for post-conviction relief.[68]

In *Kimball*, the Court focused initially on the meaning of "prejudice." The Court noted that in *Pierce* it had concluded that the *Strickland* test was consistent with the definition of prejudice set out in *Maroney*.[69] Nevertheless, the Court acknowledged that subsequent decisions applying *Pierce* had focused not on whether counsel's conduct compromised the reliability of the proceeding, a central concern of the Court in *Strickland*, but on whether the defendant had proven that, but for counsel's conduct, the outcome of the proceeding would have been different.[70] Citing the United States Supreme Court's *Lockhart v. Fretwell*,[71] the Court acknowledged that prejudice under *Strickland* was not purely outcome determinative but stated that because the reliability of the adjudication and the probability that counsel's conduct "caused a different outcome . . . are concepts so closely intertwined and commonly rooted in *Strickland*,"[72] it would not treat them as separate tests for evaluating claims of ineffectiveness. Using broad language, the Court held that when a defendant in a PCRA proceeding demonstrates that counsel's conduct has created a reasonable probability that the truth-determining process was undermined, it follows that "no reliable adjudication of guilt . . . could have taken place."[73]

Turning to the issue of whether the language in the PCRA that requries a defendant to establish that counsel's conduct "undermined the truth determining process"[74] requires a defendant to meet a more demanding standard than the *Pierce/Strickland* test, the Court concluded that "[b]oth the PCRA language and *Pierce* reflect two aspects of the same standard," namely "*Strickland's* test for determining when counsel's ineffectiveness prejudiced the defendant."[75] The PCRA language, the Court held, simply captures the reliability of the result language of *Strickland* while *Pierce* focused on

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counsel.

67. 724 A.2d 326.
68. *See id.* at 332.
69. *See Kimball*, 724 A.2d at 330 *citing Maroney*, 235 A.2d 349.
70. *Id.*
71. 506 U.S. 364 (1993).
72. *Kimball*, 724 A.2d at 333.
73. *Id.*
74. 42 Pa. Consol. Stat. § 9543(a)(2)(i).
75. *Kimball*, 724 A.2d at 332.

whether, because of counsel's conduct, the "result of the proceeding would have been different."[76] Consequently, the Court held the standard for evaluating ineffectiveness claims is the same whether the claim is raised on direct appeal or in a post-conviction proceeding.[77] To hold otherwise, the Court stated, would require it "to recognize that the ineffective assistance of counsel test adopted in *Pierce* is actually less stringent than the *Strickland* standard."[78] Such a holding, the Court concluded, would be inconsistent with the holding of *Pierce*, which stated that the standard in Pennsylvania for evaluating ineffective assistance claims is "identical" to that set out in *Strickland*.[79]

In a decision concurring only in the result, Justice Castille argued that in *Fretwell*,[80] the United States Supreme Court recognized outcome determination and reliability of the adjudication as "separate concepts" and that the majority erred in refusing to treat them as such.[81] In Justice Castille's view, the PCRA does not provide relief where counsel's acts or omissions do not undermine the reliability of the process by which truth is determined, even though a court may conclude that the outcome of the trial would have been different but for counsel's conduct. Collateral relief on the grounds of ineffectiveness, Justice Castille stated, is available only where counsel's conduct "undermined the reliability of the process by which truth is ascertained . . . ."[82]

1. Analysis of *Kimball*

In *Kimball*, the Court resolved the issue that had sharply divided the Court in *Buehl*. The Court's decision in *Kimball* that the PCRA does not create a separate and more demanding standard for evaluating claims of ineffectiveness is supported first by the language in *Strickland*.[83] The *Kimball* Court's decision is further supported by the unfairness that would result from interpreting the PCRA as requiring a showing of prejudice beyond that necessary for relief to be granted when such a claim is presented on direct appeal.[84] In resolving this issue, the *Kimball* Court's failure to consider post-*Strickland* United States Supreme Court decisions concerning the prejudice requirement puts in question whether the standard for evaluating ineffectiveness claims in Pennsylvania today is in fact "identical" to the *Strickland* standard.[85]

76. *Id.*
77. *See id.* at 333-36.
78. *Id.* at 332.
79. *See Pierce*, 527 A.2d 973.
80. 506 U.S. 364 (1993).
81. *Kimball*, 724 A.2d at 337-39 (Castille, J., concurring).
82. *Id.* at 339 (Castille, J., concurring).
83. *See id.* at 332-33.
84. *See id.*
85. *Id.* at 332.

a. Establishing ineffectiveness of counsel under the PCRA

The question the Court in both *Buehl* and *Kimball* confronted was whether the legislature, in requiring a defendant asserting ineffectiveness of counsel as a basis for post-conviction relief to establish that counsel's conduct "so undermined the truth determining"[86] that a "reliable adjudication of guilt"[87] could not have taken place, intended the defendant to meet a more stringent standard than the *Pierce/Strickland* standard that governs claims of ineffectiveness considered on direct appeal. As noted, a plurality of the *Buehl* Court concluded that while under *Pierce/Strickland* the result of Buehl's trial "may have been different" because of counsel's conduct, Buehl was not entitled to PCRA relief because the adjudication of his guilt was reliable.[88]

Central to the *Kimball* Court's holding that the PCRA does not establish a separate, more demanding, prejudice test is the textual similarity between the language in section 9543(a)(2)(ii) of the PCRA and United States Supreme Court's discussion of prejudice in *Strickland.* The PCRA authorizes relief where the defendant establishes that counsel's conduct "so undermined" the process "that no reliable adjudication of guilt... could have taken place."[89] In *Strickland*, the United States Supreme Court emphasized the central of role of reliability of the verdict in evaluating a claim of ineffectiveness.[90] The purpose of right to counsel, the Court stated, is to "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."[91] The "benchmark," according to the Court, for judging a claim of ineffectiveness is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[92] Specifically addressing the defendant's burden of establishing that counsel's deficient performance prejudiced the defense, the Court held that the defendant must show "that counsel's errors were so serious as to deprive the defendant of a

86. 42 Pa. Consol. Stat. § 9545(a)(2)(ii).

87. *Id.*

88. *Buehl*, 658 A.2d at 779.

89. 42 Pa. Consol. Stat. § 9543(a)(2)(ii).

90. *See Strickland*, 466 U.S. at 691-92.

91. *Id.* The *Strickland* test has been subject to much criticism. Justice Blackmun noted, "Ten years after the articulation of that standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.'" *McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting) (quoting *Strickland*, 466 U.S. at 685). *See also* William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal Practical Undermining of the Right to Counsel*, 4 Wm. & Mary Bill Rts. J. 91 (1995); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835 (1994); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. Rev. L. & Soc. Change 59 (1986); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 Hastings Const. L.Q. (1986).

92. *Strickland*, 466 U.S. at 686.

fair trial, a trial whose result is reliable."[93] According to *Strickland*, a defendant establishes the unreliability of the proceeding by showing a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[94] The Court emphasized that unless a defendant established both deficient performance and prejudice, it could not be concluded that the verdict resulted from a "breakdown in the adversary process that renders the result unreliable."[95] According to *Kimball*, the language of the PCRA, with its emphasis on the reliability of the adjudication of guilt, tracks the *Strickland* definition of prejudice.[96] The *Kimball* court thus interpreted *Strickland* as requiring that a defendant alleging ineffectiveness under the PCRA must establish acts or omissions by counsel that "undermined" the reliability of the adjudication of guilt.[97]

Kimball held that there is a single standard in Pennsylvania to review claims of ineffectiveness of counsel whether such claims are raised on direct appeal or on collateral review.[98] Contrary to Justice Castille's dissent in *Kimball*,[99] this holding is not in conflict with the United States Supreme Court's post-*Strickland* decision in *Fretwell*.[100] In *Fretwell*, as discussed more fully below, the United States Supreme Court noted that the *Strickland* standard does not identify prejudice based solely on outcome, but instead considers whether counsel's deficient performance renders the proceeding unreliable.[101] The Court held that where counsel's error did not deprive the defendant of any substitute or procedural right to which the law entitles him, the defendant does not suffer prejudice even though the result of the proceeding would have been different but for counsel's deficient performance.[102] The *Fretwell* Court, as *Kimball* noted, stated that it was not deviating from *Strickland* in focusing on reliability of the proceeding in determining whether a defendant is prejudiced by counsel's mistake.[103]

Finally, in addition to the unfairness *Kimball* noted would result if the PCRA standard of prejudice was deemed more demanding than the standard on direct appeal, the Court in *Strickland* specifically rejected "special standards" for claims of ineffectiveness presented in collateral proceedings.[104] Although *Strickland* considered the issue in the context of federal habeas corpus, the Court's reasoning can be applied to state collateral proceedings such as the PCRA.[105] The "principles governing ineffectiveness claims," the

93. *Id.* at 687.
94. *Id.* at 694.
95. *Id.* at 687.
96. *See Kimball*, 724 A.2d at 332.
97. *Id.* at 333.
98. *See id.* at 332.
99. *See id.* at 338 (Castille, J., dissenting).
100. *See Fretwell, 506 U.S. at 372.*
101. *Id.*
102. *Id.*
103. *See id.* at 369 n. 2.
104. *See Strickland*, 466 U.S. 668.
105. *Id.*

Court stated, "should apply in . . . collateral proceedings as they do on direct appeal" because a claim of ineffective assistance of counsel "is an attack on the fundamental fairness of the proceeding whose result is challenged."[106] Moreover, application of a more demanding standard of prejudice in a state collateral proceeding than that required by *Strickland,* which results in the denial of a claim of ineffectiveness that otherwise satisfies the *Strickland* standard, would arguably entitle the defendant to federal habeas corpus relief. The defendant would be entitled to habeas corpus relief because such a decision would be "contrary to," or involve an "unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States . . . ."[107] Because no valid purpose is served by denying state collateral relief to a defendant who is entitled to federal habeas corpus relief, the Court in *Kimball* correctly concluded that the PCRA does not require a defendant to satisfy a standard of prejudice that is more demanding than that articulated in *Strickland* when relief is sought on the basis of ineffectiveness of counsel.

b. *Kimball* and the meaning of prejudice

The Court's holding in *Kimball,* determining that the PCRA mirrors the reliability language of *Strickland,* required the court to conclude that there is no difference between the PCRA and the standard that governs the consideration of ineffectiveness claims on direct appeal. The Court noted that to hold otherwise, would require it to recognize that the standard adopted in *Pierce* was, in fact, less demanding than the *Strickland* standard.[108] The Court stated it was precluded from reaching that conclusion because *Pierce* expressly recognized that the standard for evaluating claims of ineffectiveness on direct appeal is "identical" to the *Strickland* standard.[109] But the Court's holding in *Kimball,* finding that where a defendant on direct appeal or in a post conviction proceeding demonstrates that counsel's deficient performance has created a "reasonable probability that the outcome of the proceeding would have been different, then no reliable adjudication of guilt . . . could have taken place,"[110] does not take into account post-*Strickland* United States Supreme Court decisions holding that with respect to certain types of lawyer error, the proceeding is not unreliable

106. *Strickland,* 466 U.S. at 697.

107. 28 U.S.C. § 2254(d)(1) (Supp. 2000). In *Nix v. Whiteside,* 475 U.S. 157 (1986), the Supreme Court described the *Strickland* prejudice standard as less demanding than the preponderance standard. "[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under Strickland . . . ." *Id.* at 175. In *Matteo v. Superintendent, SCI Albion,* 171 F.3d 877, 890 (3d Cir. 1999), the Third Circuit held that while Congress intended federal habeas corpus courts to defer to reasonable state court adjudications, habeas corpus relief is warranted where the "state court decision . . . resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent."

108. *See Kimball,* 724 A.2d at 332.

109. *Id.*

110. *Id.* at 333.

where the result of the proceeding would have been different but for the lawyer's conduct. As a result, it can be argued that the standard for evaluating ineffectiveness claims in Pennsylvania is no longer identical to *Strickland.*

In *Strickland*, the Court set out an outcome test in order to determine whether lawyer error compromised the reliability of the proceeding. Under *Strickland,* except in limited circumstances where prejudice is presumed, a defendant must prove that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[111] A reasonable probability, the Court noted, "is a probability sufficient to undermine confidence in the outcome"[112] of the proceeding. The Court qualified the outcome test by excluding from the assessment of the likelihood of a result more favorable to the defendant the possibility of "arbitrariness, whimsy, caprice, [or] 'nullification'..."[113] because the Court held a defendant is not entitled to "the luck of a lawless decisionmaker."[114] The assessment of prejudice, the Court stated, "should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."[115]

In two cases since *Strickland*, the Court has addressed the prejudice prong of the *Strickland* standard. In *Nix v. Whiteside*,[116] the Court concluded that the defendant had not been prejudiced by counsel's actions in response to threatened perjury by the defendant.[117] Counsel in *Nix*, upon learning that the defendant intended to commit perjury, warned the defendant that such action would, among other things, require counsel to inform the court of the perjury.[118] The defendant subsequently testified without perjuring himself but later claimed that counsel's warning had deprived him of his right to effective assistance of counsel.[119] The Supreme Court concluded that the defendant failed to satisfy both the performance and prejudice prongs of *Strickland.*[120]

Chief Justice Burger's discussion of whether the defendant was prejudiced by counsel's actions begins by noting the language in *Strickland* that in judging the likelihood of a different outcome, the defendant has no entitlement to the "luck of a lawless decisionmaker."[121] Even if the jury might have believed the defendant's perjurious testimony, the Court held that the defendant had "no valid claim that confidence in the result of his

111. *Strickland*, 466 U.S. at 694.
112. *Id.*
113. *Id.* at 695.
114. *Id.*
115. *Id.*
116. 475 U.S. 157 (1986).
117. *Id.*
118. *See id.*
119. *See id.*
120. *See id.*
121. *Id.* at 175 (quoting *Strickland*, 466 U.S. at 695).

trial has been diminished by his desisting from the contemplated perjury"[122] because the defendant's "truthful testimony could not have prejudiced the result of his trial . . . ."[123] In a concurring opinion, Justice Blackmun stated that the defendant was not prejudiced because he was neither deprived of a fair trial nor denied the opportunity to assert rights guaranteeing a fair trial.[124]

In *Fretwell*, the Court returned to the meaning of prejudice, holding specifically that *Strickland* did not establish a purely outcome determinative test in evaluating whether deficient lawyer performance denied the defendant his right to effective counsel. In *Fretwell*, counsel at the capital sentencing proceeding failed to object to the jury's consideration of an aggravating factor — pecuniary gain — that had already been considered when the jury found the defendant guilty of murder in the course of robbery.[125] Under then existing Eighth Circuit precedent, such double counting was unconstitutional and had counsel made the objection, the defendant would have been sentenced to life imprisonment.[126] By the time defendant raised the ineffective assistance of counsel claim, the precedent which held double counting unconstitutional had been overruled.[127] Even though the state conceded that counsel's performance was deficient[128] and did not dispute the lower court's holding that the defendant would not have been sentenced to death if a timely objection had been made, the Court held that "[s]heer outcome determination [is] not sufficient to make out a claim under the Sixth Amendment."[129] According to the Court, prejudice under *Strickland* requires consideration of whether counsel's deficient performance renders the "result of trial unreliable or the proceeding fundamentally unfair."[130] The Court held that a proceeding is neither unreliable or unfair if counsel's error does not "deprive the defendant of any substantive or procedural right to which the law entitles him."[131] In *Fretwell*, the Court concluded that the sentencing proceeding was neither unfair nor unreliable because given the change of law, the defendant was not entitled to the objection his lawyer failed to make.[132]

In a concurring opinion, Justice O'Connor, the author of *Strickland*, noted that in *Strickland*, the Court recognized that certain factors could not be considered in assessing prejudice.[133] Justice O'Connor characterized *Fretwell* as a case like *Nix*, in which the Court identified an additional factor,

122. *Id.*
123. *Id.* at 176.
124. *Id.* at 186-87 (Blackmun, J., concurring).
125. *See Fretwell*, 506 U.S. at 369 n. 1.
126. *See id.* at 368.
127. *See Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), *overruled*, *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989).
128. *See Fretwell*, 506 U.S. at 369 n. 1.
129. *Nix*, 475 U.S. at 175-76 (1986).
130. *Fretwell*, 506 U.S. at 372 (citing *Strickland*, 466 U.S. at 687).
131. *Id.* at 372.
132. *See id.*
133. *See id.* at 373.

namely the effect of an objection the court, in assessing prejudice, knows to be meritless under current law, cannot be taken into account in determining whether counsel's conduct prejudiced the defendant.[134]

The post-*Strickland* United States Supreme Court cases make clear that the prejudice requirement of an ineffective assistance of counsel claim is not purely an outcome determination test. *Strickland* recognized that the prejudice standard was not solely outcome based by holding that certain so-called "lawless" conduct of the decisionmaker could not be considered in assessing whether the result of the proceeding would have been different because to do so would produce an unjust result.[135] *Nix* and *Fretwell* do not replace *Strickland's* outcome test with a reliability of the adjudication standard. Rather, the cases add to the list of factors that courts cannot consider in determining whether counsel's conduct prejudiced the defendant. In both cases, the Court held that the claimed error by counsel did not prejudice the defendant because, analogous to the "lawless decisionmaker,"[136] to factor such act or omission would produce an unjust result — a "windfall."[137]

In light of *Nix* and *Fretwell*, the majority in *Kimball* erred in concluding that whenever a defendant meets the outcome determination test, "no reliable adjudication of guilt could have taken place."[138] The holding fails to take into account language in post-*Strickland* decisions that an analysis of lawyer error that focuses "solely on mere outcome determination" is "defective."[139] The post-*Strickland* Supreme Court cases discussed above establish that lawyer errors that do not deprive the defendant of any "substantive or procedural right,"[140] which the defendant is entitled to under the law, cannot be a factor in assessing prejudice even though the result of the proceeding would have been different but for the lawyer's conduct. Because *Kimball* concluded that a proceeding is unreliable where there is a reasonable probability that lawyer error changed the outcome of the proceeding,[141] the test for evaluating claims of ineffectiveness of counsel in Pennsylvania is less demanding than the *Strickland* test and in conflict with the *Pierce* Court's holding that the Pennsylvania standard for ineffectiveness claims is "identical" to *Strickland*.[142]

B. Direct Appeal as Implicating the Truth Determining Process

The question of whether lawyer errors that occur following conviction are cognizable under the PCRA was initially considered by the Superior

134. *Id.* at 374-75 (O'Connor, J., concurring).
135. *See Strickland*, 466 U.S. at 669.
136. *Id.* at 695.
137. *Fretwell*, 506 U.S. at 370.
138. *Kimball*, 724 A.2d at 333.
139. *Fretwell*, 506 U.S. at 369.
140. *Id.* at 372.
141. *See Kimball*, 724 A.2d at 333.
142. *See Pierce*, 527 A.2d at 976-77.

Court in the context of appellate counsel's failure to inform defendant of his right to seek discretionary review. In *Commonwealth v. Tanner*,[143] the Court held that an ineffectiveness claim under the PCRA must raise the question of whether an "innocent individual" has been convicted.[144] The Court concluded that because counsel's claimed ineffectiveness did not bear on the defendant's "ultimate guilt or innocence,"[145] counsel's error did not implicate the "truth determining process" and, therefore, defendant was not entitled to relief under the PCRA.

The rationale of *Tanner* was relied upon by the Superior Court in holding that a defendant was not entitled to post-conviction relief where counsel fails to preserve his right to direct appeal. In *Commonwealth v. Petroski*,[146] the Court held that a defendant claiming ineffectiveness of counsel was required to establish innocence in order to be entitled to post-conviction relief.[147] Finding that defendant's petition contained no averment that counsel's failure to appeal "undermined the truth determining process"[148] or prevented a "reliable determination of guilt or innocence,"[149] the Court affirmed the denial of post-conviction relief. Nor could such a claim be made, the Court noted, because the truth determining process occurs during trial and "[m]atters occurring after judgment . . . cannot determine what has occurred before."[150] In denying relief under the PCRA, the Court stated it was not deciding whether the defendant was entitled to seek relief under some other procedure.[151]

The issue of a defendant's entitlement to post-conviction relief where counsel fails to protect the right to direct appeal was considered by the Pennsylvania Supreme Court in *Commonwealth v. Lantzy*.[152] In *Lantzy*, the Court reviewed an *en banc* decision of the Superior Court in which the Court, seeking to clarify *Petroski*, noted that ineffectiveness of counsel with respect to protecting a defendant's right to direct appeal "may well affect the truth determining process . . . ."[153] and, therefore, such a defendant is not

143. 600 A.2d 201 (Pa. Super. 1991).
144. *Id.* at 205.
145. *Id.*
146. 695 A.2d 844 (Pa. Super. 1997).
147. *See id.* at 846.
148. *Id.* at 847.
149. *Id.*
150. *Id.* Prior to *Petroski*, where a defendant established that he requested counsel to file a direct appeal and counsel disregarded the request, the defendant was granted post-conviction relief in form of an appeal *nunc pro tunc* without requiring the defendant to establish that, had an appeal been taken, the appellate court would have granted the requested relief. While this approach to ineffectiveness developed under the PCHA, it had been applied by the Superior Court to claims of ineffectiveness under the PCRA. *See e.g. Commonwealth v. Hoyman*, 561 A.2d 756 (Pa. Super. 1989) (where PCRA court concluded that when defendant has been denied his or her right to direct appeal, the PCRA court should grant the defendant leave to file a direct appeal *nunc pro tunc*).
151. *See id.*
152. 736 A.2d 564 (Pa. 1999).
153. *Lantzy*, 712 A.2d at 291.

"always ineligible for relief under the PCRA."[154] The defendant, the Superior Court held, was not entitled to post-conviction relief because he had failed to prove that counsel's conduct compromised the truth determining process.[155] In dicta, the Court noted that where a defendant asserts that counsel's ineffectiveness deprived him of a right to appeal "causing him prejudice but not affecting the underlying verdict or adjudication," the defendant can seek relief outside the PCRA by requesting an appeal *nunc pro tunc*.[156]

In reversing the Superior Court, the Pennsylvania Supreme Court held that the PCRA provides the "exclusive remedy"[157] where a defendant seeks the restoration of appeal rights due to counsel's failure to perfect a direct appeal. Relying upon its recent holding in *Commonwealth v. Chester*[158] that claims arising during the penalty phase of a capital case are cognizable under the PCRA, the Court recognized that a narrow interpretation of the PCRA, applying only to claims directly implicating the reliability of the adjudication of guilt, would lead to a bifurcated system of review whereby claims considered outside the PCRA would be subject to habeas corpus review. In light of the language of section 9542 of the PCRA, which states that the PCRA is intended to provide the "sole means" for obtaining collateral relief, the Court concluded the legislature intended that all post-conviction claims that would otherwise qualify for habeas corpus review be considered within the framework of the PCRA.[159] Referring to its decision in *Kimball*, the Court rejected the Superior Court's interpretation of section 9543(a)(2)(ii) governing ineffectiveness claims as requiring a defendant to plead and prove innocence to be entitled to relief.[160] The "truth determining" language of the PCRA, the Court held, is the "equivalent to the prejudice requirement applied by the federal courts to both direct and collateral review under *Strickland*...."[161] Under *Strickland*, the Court noted prejudice is presumed when there is an actual or constructive denial of counsel.[162] Consequently, where counsel disregards a defendant's request to file a direct appeal, the defendant is entitled to PCRA relief without establishing either innocence or demonstrating the merits of the issues that would have been raised on

154. *Id.*

155. *Id.*

156. *Id.* In a dissenting opinion, President Judge McEwen argued that where counsel deprives a defendant of his constitutionally guaranteed right to a direct appeal, the claim is cognizable under the PCRA, regardless of the nature of merits of the issues the defendant seeks to raise on appeal. The dissent was also of the opinion that the majority's suggestion that defendant who had been denied the right to direct appeal had a remedy outside the PCRA, presumably by seeking habeas corpus, would impose burdens on trial courts because habeas corpus, unlike the PCRA, does not provide provisions for the prompt disposition of petition which are clearly meritless.

157. *See Lantzy*, 736 A.2d at 570.

158. 733 A.2d 1242 (Pa. 1999).

159. *Id.* at 1250-51.

160. *See Lantzy*, 736 A.2d at 570.

161. *Id.* at 571.

162. *See id.*

appeal.[163]

The rationale of *Lantzy* supports granting a defendant post-conviction relief to reinstate the right to seek discretionary review in the Pennsylvania Supreme Court that was lost due to counsel's ineffectiveness.[164] Central to the Superior Court's decision in *Tanner* denying the defendant PCRA relief was the interpretation of the PCRA rejected by the Court in *Lantzy* and *Kimball*, namely that an ineffectiveness claim must raise a question of whether an innocent person has been convicted.

Although counsel on discretionary review, unlike direct appeal,[165] is not constitutionally guaranteed,[166] Rule 316 of the Pennsylvania Rule of Criminal Procedure has been interpreted by the Pennsylvania Supreme Court to "guarantee . . . that a person seeking allowance of appeal is entitled to the assistance of counsel."[167] When counsel is appointed to represent an indigent defendant in a first PCRA proceeding, Rule 1504 provides the defendant with representation "throughout the . . . proceedings, including any appeal" in the matter.[168] Recently, as discussed below, the Pennsylvania Supreme Court held that a defendant has an "enforceable right to effective post-conviction counsel."[169] Because the Court has extended post-conviction relief to defendants where counsel, although not required by the federal or state constitution, was ineffective, post-conviction relief should be available where counsel, appointed pursuant to either Rule 314 or Rule 1504 of the Pennsylvania Rules of Criminal Procedure, failed to advise a defendant of his right to seek discretionary review.

The need for a remedy in such a case has been made more compelling by the United States Supreme Court's recent decision holding that federal habeas corpus review is not available where a defendant did not seek discretionary review in the state court of last resort.[170] Federal habeas corpus assures that state court adjudications of federally guaranteed rights are not "contrary to," or involve "an unreasonable application of clearly established

163. *See id.*

164. *See Hull v. Kyler*, 190 F.3d 88, 89 (3d Cir. 1999) (counsel failed to notify defendant of the Superior Court's decision affirming the denial of post-conviction relief until after the time to seek discretionary review had elapsed).

165. *See Douglas v. California*, 372 U.S. 353 (1963); Pa. Const. art. § 9.

166. *See Ross v. Moffitt*, 417 U.S. 600, 600 (1974); *Commonwealth v. Gilbert*, 595 A.2d 1254, 1257 (Pa. Super. 1991) ("Review by the Supreme Court following Superior Court review is not constitutionally guaranteed.").

167. *Commonwealth v. Daniels*, 420 A.2d 1323, 1323 (Pa. 1980). *See also Commonwealth v. West*, 482 A.2d 1339, 1343 (Pa. Super. 1984).

168. Pa. R. Crim. P. 1504 (2000). *See also Commonwealth v. Sangricco*, 415 A.2d 65, 68 n.2 (Pa. 1980) (stating right to counsel extends to appeal from PCHA hearings); *Commonwealth v. Cooney*, 266 A.2d 650, 651 (Pa. 1970) (holding that defendant's appointment of counsel did not end with an adverse determination); *Commonwealth v. Walters*, 244 A.2d 757, 760 (Pa. 1968) (stating that defendant's right to counsel includes counsel on appeal).

169. *Commonwealth v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998). Although *Albrecht* was decided in the context of a first petition, its rationale arguably applies whenever counsel is appointed pursuant to Rule 1504.

170. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

federal law."[171] Therefore, habeas corpus review should not be foreclosed because of lawyer error.

II. THE COURT LIMITS PCRA RELIEF BY NARROWLY CONSTRUING THE TIME FOR FILING REQUIREMENT

Prior to the 1995 amendments, the PCRA did not require a defendant to file a petition for post-conviction relief within a specified period following a guilty plea, conviction, or direct appeal. Rather, section 9543(b) authorized a court to dismiss a petition if, because of delay in the petition filing, the prosecution had been prejudiced in its ability either to respond to the petition or to retry the defendant.[172]

As a result of the 1995 amendments to the Act, section 9545(b) now requires, with few exceptions, that a post-conviction petition, including a second or subsequent petition, be filed within one-year of the judgment becoming final.[173] A judgment becomes final at the conclusion of direct review, including discretionary review in the Pennsylvania Supreme Court and the United States Supreme Court, or at the expiration of the time to seek such review.[174] The one-year period does not apply if the defendant establishes interference by a government official with the presentation of the claim.[175] Nor does the period apply if the defendant pleads and proves that the facts upon which the claim is based were unknown to the defendant,[176] or that the claim asserted is a constitutional right recognized after the time period and is to be applied retroactively.[177] Under the amendments, "government official" does not include defense counsel, appointed or retained.[178] A petition claiming one of the exceptions must be filed "within 60 days of the time the claim could have been presented."[179] Although a

171. 28 U.S.C. §2254(d)(1) (Supp. 11, 1998).

172. *See* 42 Pa. Consol. Stat. § 9543(b) (West 1998); *Commonwealth v. Young*, 695 A.2d 414, 420-21 (Pa. Super. 1997).

173. *See* 42 Pa. Consol. Stat. § 9545(b)(1) (West 1998).

174. *See* 42 Pa. Consol. Stat. § 9545(b)(3) (West 1998). Where a defendant's sentence became final more than a year prior to the effective date of the 1995 amendments, a grace period allowed a first petition to be filed within one year of the effective date of the amendments. Act of November 17, 1995, P.L. 1118, No. 32 (Spec. Sess. No. 1, § 3(1)). *See Thomas*, 718 A.2d at 329 (Pa. Super. 1998) ("[I]t was the intention of the legislature to permit an otherwise untimely first PCRA petition to be filed within one year following the effective date of the 1995 PCRA amendments, but that exception was not intended to apply to subsequent petitions regardless of when a first petition was filed"); *Commonwealth v. Lewis*, 718 A.2d 1262, 1263 (Pa. Super. 1998), *appeal denied*, 737 A.2d 1224 (1999)(petition seeking post-conviction relief, which results in the granting of a direct appeal *nunc pro tunc*, is not a prior petition for purposes of the one-year exception). A petition seeking post conviction relief that merely results in the granting of an appeal *nunc pro tunc* is not a prior petition for purposes of the one-year exception pursuant to the Act of November 17, 1995, P.L. 1118, No. 32 (Spec. Sess. No. 1), § 3(a).

175. *See* 42 Pa. Consol. Stat. § 9545(b)(1)(i) (West 1998).

176. *See* 42 Pa. Consol. Stat. 9545(b)(1)(ii) (West 1998).

177. *See* 42 Pa. Consol. Stat. 9545(b)(1)(iii) (West 1998).

178. 42 Pa. Consol. Stat. § 9545(b)(4) (West 1998).

179. 42 Pa. Consol. Stat. § 9545(b)(2) (West 1998).

petition appears untimely on its face, if it is defendant's first petition, the Pennsylvania Superior Court has held that the PCRA court must appoint counsel if the defendant is indigent.[180] A defendant has a right to appeal the decision of the PCRA court dismissing a petition as untimely under the 1995 amendments.[181]

A. The Nature of the One-Year Filing Requirement

Whether a PCRA court has authority to consider an untimely petition where the defendant does not establish a statutory exception to the one-year period has been addressed in several recent decisions. The issue of timeliness under the 1995 amendments was first considered by the Superior Court in *Commonwealth v. Hall.*[182] In *Hall*, the Court accepted an appeal where the lower court had found defendant's PCRA petition untimely but granted defendant leave to appeal *nunc pro tunc* outside the PCRA. Although not stated in the decision, counsel had apparently failed to protect the defendant's right to direct appeal. Stating the issue as whether the time-for-filing requirement in section 9545(b) may be overridden by a grant of a right to appeal *nunc pro tunc*, the Court, acknowledging that section 9542 provides that the PCRA is the "sole means" for seeking collateral relief, nonetheless found support for accepting the appeal.[183] The Court relied on both its prior decisions[184] and the Pennsylvania Supreme Court's decision in *Commonwealth v. Stock*,[185] which held that in extraordinary circumstances, where the right to appeal was denied, an appeal *nunc pro tunc* should be allowed.

Since *Hall*, the Pennsylvania Supreme Court has specifically addressed the nature of the one-year limitation. In *Commonwealth v. Peterkin*,[186] the Court rejected a constitutional challenge to the one-year filing requirement.[187] The Court initially concluded that the 1995 amendments require "as a matter of jurisdiction" that a PCRA petition be filed within one-year of final judgment.[188] The Court offered no support for its conclusion that the time limit was jurisdictional other than citing the statute.[189] The Court noted its decision in *Stock* but stated that it found "nothing in Peterkin's circumstances which would bring him within this rule."[190] The Court went on to hold that because the time limit is

180. *See Commonwealth v. Walker*, 721 A.2d 380, 382 (Pa. Super. 1998).

181. *See Commonwealth v. Perry*, 716 A.2d 1259, 1261 (Pa. Super. 1998); *Commonwealth v. Austin*, 721 A.2d 375, 377 (Pa. Super. 1998).

182. 713 A.2d 650 (Pa. Super. 1998).

183. *See id.* at 651.

184. *See In re A.P.*, 617 A.2d 764 (Pa. Super. 1992), *aff'd*, 639 A.2d 1181 (Pa. Super. 1994); *Lantzy*, 712 A.2d 288 (Pa. Super. 1998), *rev'd*, 736 A.2d 564 (Pa. 1999).

185. 679 A.2d 760 (Pa. 1996).

186. 722 A.2d 638 (Pa. 1998).

187. *See id.* at 654.

188. *Id.* at 641.

189. *See id.* at 654-55.

190. *Peterkin*, 722 A.2d at 643 n.7.

"sufficiently generous" and that there are exceptions to the time limit, the one-year time limit does not violate due process or unconstitutionally restrict the right to seek habeas corpus relief guaranteed by the Pennsylvania Constitution.[191]

In *Commonwealth v. Fahy*,[192] the Court rejected an argument that the time limitations mandated by the 1995 amendments were subject to equitable tolling.[193] The court held that because the time limitations are jurisdictional and, therefore, mandatory, the period for filing a PCRA petition "is not subject to the doctrine of equitable tolling"[194] except to the extent the doctrine is reflected in the statutory exceptions. The Court further held that a claim of ineffectiveness of counsel does not save an otherwise untimely PCRA petition.[195] Additionally, a court cannot consider a challenge to the legality of a sentence if the petition is not timely filed or does not fall under one of the exceptions.[196] In *Fahy*, like *Peterkin*, the Court offered no support for its conclusion that the time limitation is jurisdictional other than stating that the "General Assembly amended the PCRA to require, as a matter of jurisdiction, that all petitions must be filed within a certain period of time after judgment."[197]

A time-for-filing provision may constitute a mandatory condition upon the availability of a judicial remedy and, therefore, serve as a jurisdictional bar or it may act as a statute of limitations subject to equitable tolling.[198] In contrast to the Pennsylvania Supreme Court decisions in *Peterkin* and *Fahy*, courts regularly undertake an analysis of a time limitation by considering legislative history, case law, and the purposes underlying the statute to determine the legislature's intent.[199] Such careful analysis is mandated by the Statutory Construction Act, which requires a clear showing of legislative intent in concluding that subsequent legislation limits a court's jurisdiction.[200]

The language and structure of the PCRA does not by itself establish that the legislature intended the one-year period to act as a bar to the jurisdiction of the PCRA court. The provision conferring original jurisdiction in a PCRA proceeding in the Court of Common Pleas and the time limit provision are

191. *Id.* at 643. The applicable section in the Pennsylvania Constitution is Pa. Const. art. I, § 14.

192. 737 A.2d 214 (Pa. 1999).

193. *See id.* at 222-23.

194. *Id.* at 222.

195. *See id.* at 223.

196. *See id.*

197. *Id.* at 217-18.

198. *See e.g. Bowen v. City of New York*, 476 U.S. 467, 478-79 (1986); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-94 (1982); *Matthews v. Eldridge*, 424 U.S. 319, 338 (1976); *Shendock v. Director, OWCP*, 893 F.2d 1458, 1461-66 (3d Cir. 1990).

199. *See e.g. Zipes*, 455 U.S. at 392-93; *Miller v. N.J. State Dep't. of Corrections*, 145 F.3d 616, 617-18 (3d Cir. 1998); *Smith v. Commonwealth*, W.C.A.B., 670 A.2d 1146, 1148 (Pa. 1996).

200. *See* 1 Pa. Consol. Stat. § 1928(b)(7) (West 1998). *See e.g. Jones v. W.C.A.B. (Midland-Ross)*, 612 A.2d 570, 573 (Pa. Commw. 1992), *aff'd*, 645 A.2d 209 (Pa. 1994); *In re Jones & Laughlin Steel Corp.*, 398 A.2d 186, 191 (Pa. Super. 1979), *aff'd*, 412 A.2d 1099 (Pa. 1980); *Commonwealth v. Barfod*, 50 A.2d 36, 39 (Pa. Super. 1946).

not set out in separate sections of the statute.[201] However, section 9545 of the PCRA entitled "Jurisdiction & Proceedings" clearly separates jurisdiction in subsection (a) entitled "Original Jurisdiction" from the time limits contained in subsection (b) entitled "Time for filing petition."[202] The term jurisdiction only appears in subsection (a) and the remaining subsections including (b) time limits, (c) stay of executions, and (d) evidentiary hearings are arguably the "proceedings" referred to in the heading of the section. Moreover, the three exceptions to the filing period in section 9545(b)(1) are similar to provisions found in statute of limitations in Pennsylvania[203] and suggest an interpretation of the time-for-filing period as a statute of limitations.

Although the legislative history of the 1995 amendments is sparse, it supports the view that the time-for-filing period is non-jurisdictional. In addressing the exceptions that excuse non-compliance with the one-year period, Senator Greenleaf, one of the co-sponsors of the 1995 amendments, characterized the one-year filing period as a "statute of limitations."[204]

Construing the one-year filing period as a statute of limitations subject to equitable tolling is consistent with the Court's finding in *Peterkin* that the General Assembly, in enacting the 1995 amendments to the PCRA, intended that "PCRA petitions are to be accorded finality."[205] As a statute of limitations, the one-year period contributes to finality by greatly speeding up the process of collateral review while at the same time permitting courts to equitably toll the time period in extraordinary cases where application of the time period would be unfair. Moreover, an interpretation of the time period as a statute of limitations is consistent with the provision of the PCRA that precludes a court from entertaining a request for any form of relief in anticipation of the filing of a petition under the PCRA.[206] As a result, unlike filing a direct appeal where the responsibility of complying with thirty-day time period is in most cases the responsibility of counsel,[207] an indigent defendant does not have a right to appointed counsel in a non-capital PCRA

201. *See e.g.* 28 U.S.C. § 2244(d)(1) (West 1999) (one-year period of limitation on filing of federal habeas corpus petition); 28 U.S.C. § 2241 (West 1994) (jurisdictional provision of the federal habeas corpus statute). The one-year time period governing the filing of a federal habeas corpus petition that became effective as part of the amendments to the habeas corpus statute under the Antiterrorism & Effective Death Penalty Act of 1996 has been construed by federal courts to be a statute of limitations subject to equitable tolling. *See Calderon v. U.S. Dist. Court*, 128 F.3d 1283, 1289 (9th Cir. 1997), *cert. denied*, 522 U.S. 1099 (1998); *Miller*, 145 F.3d 616 (3d Cir. 1998).

202. 42 Pa. Consol. Stat. § 9545 (West 1998).

203. *See e.g.* 42 Pa. Consol. Stat. §§ 5522, 5552 (West Supp. 1998); 42 Pa. Consol. Stat. § 5553 (West Supp. 1999).

204. Legislative Journal—Senate, 1st Special Sess. 1995, p. 214 (Statement of Senator Greenleaf). In a post-*Peterkin* but pre-*Fahy* decision, the Superior Court specifically referred to the one-year time period as a "statute of limitations." *Commonwealth v. DeHart*, 730 A.2d 991, 994 (Pa. Super. 1999).

205. *Peterken*, 722 A.2d at 642.

206. *See* 42 Pa. Consol. Stat. § 9545.

207. *See* 42 Pa. Consol. Stat. § 5571 (West 1998); *Kimball*, 724 A.2d 326; *Commonwealth v. Wilkerson*, 416 A.2d 477, 479 (Pa. 1980); *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992).

proceeding until a petition is filed.[208] Consequently, the incarcerated defendant is responsible for the preparation and timely filing of the petition.[209] As the United States Supreme Court noted, construing a time-for-filing provision as jurisdictional is "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."[210]

Even if the Court in *Peterkin* and *Fahy* is correct that the time period in section 9545(b) is jurisdictional, there is a substantial body of case law in Pennsylvania holding that time limits that are jurisdictional are subject to equitable exceptions. Courts have long permitted appeals *nunc pro tunc* where non-negligent conduct[211] or "something more than mere hardship"[212] prevented compliance with the filing period. "Appeal nunc pro tunc is intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain extraordinary circumstances."[213] As an example, in *Stock*, the Pennsylvania Supreme Court held that where the defendant requested counsel to file an appeal in a summary case and counsel failed to act, counsel's failure constituted an extraordinary circumstance that merited the remedy of an appeal *nunc pro tunc*, even though the defendant did not have a right to counsel in a summary case.

The rule adopted in the "prisoner mailbox" cases is another example of courts recognizing the unfairness that would result in strict application of time-for-filing requirements. In *Commonwealth v. Jones*,[214] the Pennsylvania Supreme Court held that where a *pro se* defendant files a direct appeal from the denial of PCRA relief, the appeal is deemed filed on the date when the prisoner deposits the appeal with prison officials or places it in the prison mailbox regardless of when it actually reaches the court.[215] In adopting the rule, the Court recognized the unique "situation of prisoners seeking to

208. Pa. R. Crim. P. 1504 (West 1989). In capital cases, pursuant to Pa R. Crim. P. 1504(f), the trial court will appoint PCRA counsel at the conclusion of direct review unless the defendant waives PCRA review, elects to proceed *pro se* or be represented by original trial or direct appeal counsel.

209. To be eligible for PCRA relief, the defendant must be in custody at the time relief is granted. 42 Pa. Consol. Stat. § 9543(a)(1) (West 1998). *E.g. Pierce*, 579 A.2d 963; *Ahltorn*, 683 A.2d 632.

210. *Zipes*, 455 U.S. at 397 (quoting Love v. Pullman Co., 404 U.S. 522, 527 (1972)).

211. *See e.g. Cook v. Unemployment Comp. Bd. of Rev.*, 671 A.2d 1130, 1131 (Pa. 1996) (explaining that court may allow appeal *nunc pro tunc* where appeal is not timely because of non-negligent circumstances as they relate to appellant or counsel); *Bass v. Commonwealth*, 401 A.2d 1133, 1135 (Pa. 1979) (stating that appeal *nunc pro tunc* permitted where appeal is untimely because of non-negligent conduct of attorney or staff). *See McKeon County Animal Hosp. v. Burdick*, 700 A.2d 541, 543 (Pa. Super. 1997); *Tarlo v. Univ. of Pitt.*, 443 A.2d 879, 880 (Pa. Cmmw. 1982).

212. *Schrenkensen v. Kishbaugh*, 29 A. 284, 285 (Pa. 1894).

213. *Stock*, 679 A.2d at 764.

214. 700 A.2d 423 (Pa. 1997).

215. *See id.* at 426. In *Jones*, the Pennsylvania Supreme Court expanded its ruling in *Smith v. Board of Probation & Parole*, 683 A.2d 278, 281 (Pa. 1996), which applied the "prisoner mailbox rule" to appeals from court orders pursuant to Pa. R. App. 1514.

appeal without the aid of counsel."[216] The Superior Court, relying on *Jones*, recently held that the "prisoner mailbox rule" applies to the filing of a *pro se* PCRA petition.[217] Using the language of equitable tolling, the Court stated that while section 9545(b)(1) permits a court to accept an untimely petition where there has been unconstitutional interference by government officials, delay by "prison personnel . . . even if it does not rise to unconstitutional interference, may unfairly limit a prisoner's right to file."[218]

The *nunc pro tunc* doctrine and the "prisoner mailbox rule" are judicial acknowledgments that unfairness may result from strict application of statutorily mandated time periods. The same concern about unfairness should apply to indigent defendants seeking PCRA relief. By determining that the time for filing a PCRA petition was not subject to equitable tolling,[219] the Court singles out one class of litigants to whom the Court may not consider the injustice that can result from a strict application of statutorily mandated time periods. Circumstances that could prevent an incarcerated defendant from complying with the statute's one-year limitation include physical or mental disability, lack of access to legal materials, and any change in an institution's normal routine. Unless Pennsylvania is prepared to close the door on all litigants who fail to meet mandatory time limits, PCRA courts should be permitted to consider an untimely petition when circumstances beyond a defendant's control make it impossible to file the petition on time.

In addition, the holding in *Fahy* that an ineffective counsel claim will not "save an otherwise untimely petition"[220] poses a potential conflict with recent decisions addressing the issue of whether a defendant has a right to effective representation in a post-conviction proceeding. For instance, the Court in *Commonwealth v. Privolos*,[221] noting that counsel was appointed pursuant to Pa. R. Crim. P. 1504(a), stated that although it had not decided whether a defendant had a right under the Pennsylvania Constitution to effective counsel in a post-conviction proceeding, it had previously recognized that counsel must "discharge the responsibilities under the rule and that a remedy may be fashioned where counsel fails to do so."[222] In *Commonwealth v. Albrecht*,[223] the Court returned to the issue of whether a defendant has a right to effective representation in a post-conviction proceeding. Relying upon its holding in *Commonwealth v. Albert*,[224] the Court stated that its power to "review, and if necessary, remedy the deficiencies of counsel at the post-conviction stage" was not "circumscribed by the parameters of the Sixth

216. *Jones*, 700 A.2d at 425 (*quoting Houston v. Lack*, 487 U.S. 266, 270 (1988)).
217. *Commonwealth v. Little*, 716 A.2d 1287, 1289 (Pa. Super. 1998).
218. *Id.* at 1289.
219. *See Fahy*, 737 A.2d at 222.
220. *Id.* at 223.
221. 715 A.2d 420 (Pa. 1998).
222. *Id.* at 422 (citing *Commonwealth v. Sangricco*, 415 A.2d 65, 68-69 (Pa. 1980)).
223. 720 A.2d 693 (Pa. 1998).
224. 561 A.2d 736 (Pa. 1989).

Amendment."[225] The Court held that Pa. R. Crim. P. 1504 "requires an enforceable right to effective post-conviction counsel."[226] When a defendant is represented by new counsel on appeal and the former counsel failed to raise particular claims in the PCRA court, an appellate court under *Albrecht* will grant relief where the defendant establishes that post-conviction counsel rendered ineffective assistance.

Compliance with the one-year filing period is likely to arise as an issue where a defendant is represented on appeal from the denial of post-conviction relief by the same counsel who represented him at the PCRA proceeding. In such a case, it is unlikely that counsel will raise his own ineffectiveness as part of the appeal from the denial of post-conviction relief.[227] If PCRA counsel's ineffectiveness is raised, it will be raised in a second or subsequent PCRA petition which will, in almost all cases, be filed beyond the one-year period.[228] The same issue might also arise if PCRA counsel fails to provide effective assistance of counsel on appeal from the denial of PCRA relief.[229] An untimely petition in either case does not meet the statutory exceptions to the one-year filing period.

In order to provide a remedy[230] for a violation of a defendant's "enforceable right to effective post-conviction counsel,"[231] ineffectiveness of PCRA counsel should be considered an extraordinary circumstance permitting the late filing of a second or subsequent petition *nunc pro tunc*. Moreover, the second petition should be treated as a first petition under the rationale of *Commonwealth v. Lewis*.[232] In *Lewis*, the Court held that where a first petition merely results in reinstating the defendant's right to direct appeal lost because of counsel's ineffectiveness, the second petition is considered the first petition because the initial petition does not result in the defendant receiving post-conviction relief.[233] Like the defendant in *Lewis*, a defendant who does not receive effective representation in the PCRA court

225. *Albrecht*, 720 A.2d at 699.

226. *Id.* at 700 (holding that a counsel appointed pursuant to Rule 1505 is held to the same standard as a counsel appointed pursuant to a constitutional mandate).

227. *See Commonwealth v. Green*, 709 A.2d 382, 384 (Pa. 1998) (holding that counsel is not precluded from raising his or her own effectiveness on appeal); *Commonwealth v. McBee*, 520 A.2d 10, 13 (Pa. 1986) (holding the case should be remanded for the appointment of new counsel unless it is either clear from the record that counsel was ineffective or the claim was meritless).

228. Although the Act is silent on the issue, assuming that the filing of a petition tolls the running of the one-year filing period, the period would begin to run again following the expiration of the time for appeal or the time to petition for allowance of appeal. If PCRA counsel was ineffective in the trial court or on appeal, it is unlikely that an indigent incarcerated defendant will recognize counsel's ineffectiveness and file a second petition during the remaining one-year period.

229. *See* Pa. R. Crim. P. 1504(d) which provides that appointment of counsel is effective throughout post-conviction proceedings, including any appeal from the disposition of the petition.

230. *See Priovolos*, 715 A.2d at 422 (holding that "a remedy may be fashioned when counsel fails to [perform effectively]").

231. *See Albrecht*, 720 A.2d at 700.

232. 718 A.2d 1262 (Pa. Super. 1998).

233. *See id.*

or on an appeal, does not receive post-conviction review, let alone relief. Treating a second and untimely PCRA petition as a timely first petition is the only way to give meaning to a defendant's right to effective post-conviction counsel.

B. Illegal Sentences and the One-Year Filing Period

The Court's holding in *Fahy* that a challenge to the legality of a sentence[234] is time barred if not raised in a PCRA petition within the one-year filing period,[235] is in conflict with decisions holding that challenges to the legality of a sentence cannot be waived[236] and provide a basis for post-conviction relief even though the defendant did not take a direct appeal following imposition of sentence.[237] The principle underlying the non-waivability of an illegal sentence claim is that courts are empowered to correct an illegal sentence[238] pursuant to the well-established principle that "under our constitution [courts] have certain inherent rights and powers to do all such things as are reasonably necessary for the administration of justice."[239] A court's power to correct an illegal sentence is not limited by the statutory provision[240] that strips a court of authority to alter or amend a sentence thirty days after entry of a sentence.[241] The "inherent power of the court"[242] to correct an illegal sentence "is not eliminated by the expiration of the thirty-day appeal period."[243] The non-waivable nature of an illegal sentence claim permits a sentencing court to "correct an illegal sentence . . . at anytime"[244] and the issue may be "the subject of inquiry by an appellate court *sua sponte*."[245] Such claims can be reviewed at any time because a court has no authority to impose a sentence in violation of the law.[246] In holding that illegal sentence claims are time barred if not presented within the one year filing period, the Court in *Fahy* ignores settled precedent and undermines the basic responsibility of the judiciary to do "such things . . .

234. *See* 42 Pa. Consol. Stat. § 9545 (b)(1)(West 1998).

235. *See Fahy*, 737 A.2d at 218.

236. *See Commonwealth v. Isabell*, 467 A.2d 1287, 1290 (Pa. 1983) (stating that a "challenge to a sentence which is unlawful *per se* is not waived where it is raised for first time on appeal"); *Commonwealth v. Williams*, 660 A.2d 614, 618 (Pa. Super. 1995); *Commonwealth v. Pastorkovic*, 567 A.2d 1089, 1091 (Pa. Super. 1989) (stating that " 'illegality' of sentence is nonwaivable issue and . . . may be the subject of inquiry by an appellate court *sua sponte*").

237. *See Commonwealth v. Shannon*, 608 A.2d 1020 (Pa. 1992); *Commonwealth v. Lehr*, 583 A.2d 1234 (Pa. Super. 1990); *Commonwealth v. Perdue*, 564 A.2d 489 (Pa. Super. 1989); *Commonwealth v. Mitchell*, 465 A.2d 1284, *corrected*, 483 A.2d 1389 (Pa. Super. 1983).

238. *See Jones*, 554 A.2d at 52.

239. *Sweet v. Pa. Labor R.B., County of Washington*, 322 A.2d 362, 365 (Pa. 1974).

240. *See* 42 Pa. Consol. Stat. § 5505 (West 1998) (repealed).

241. *See Commonwealth v. Quinlan*, 639 A.2d 1235, 1239 (Pa. Super. 1994).

242. *See id.*

243. *Id.*

244. *Commonwealth v. Isabell*, 467 A.2d 1287, 1291 n. 6 (Pa. 1983).

245. *Pastorkovic*, 567 A.2d at 1091. *See also Commonwealth v. Ford*, 461 A.2d 1281, 1289 (Pa. Super. 1983).

246. *See Jones*, 554 A.2d at 52.

necessary for the administration of justice."[247]

C. *State Habeas Corpus and the PCRA's One-Year Filing Period*

The relationship between habeas corpus guaranteed by Article I, Section 14 of the Pennsylvania Constitution[248] and the PCRA has been considered by the Pennsylvania Supreme Court in several recent cases.[249] The issue arose where post-conviction relief has not been sought within the required one-year time period.[250] In these cases, defendants argued that if they do not have a remedy under the PCRA, the Court should treat their claims for collateral relief as a request for habeas corpus.[251] In other cases, defendants have argued that if the PCRA does not apply to certain claims, courts have authority to grant habeas corpus relief or relief *nunc pro tunc.*[252]

Pennsylvania has had a habeas corpus statute since 1785,[253] and the right has been constitutionally guaranteed in Pennsylvania since 1790.[254] In an early decision, the Pennsylvania Supreme Court held that the common law writ of habeas corpus, described by the Court as "much broader [in] scope," existed alongside the form of the writ secured by statute.[255] In another early decision, the Superior Court referred to the common law form of the writ as an "implied common law power, not created by the habeas corpus act . . . but existing both before and since the passage of [the] act . . . ."[256] Common law habeas corpus gradually evolved from a remedy to correct illegal sentences to providing defendants the means to collaterally challenge convictions where fundamental error occurred at trial.[257] The Pennsylvania Supreme Court specifically addressed the relationship between the two forms of habeas corpus in a decision just prior to the enactment of the PCHA holding that statutory habeas had "no application . . . ."[258] Rather, such claims, the court held, were to be considered under the common law form of the writ "which

247. *Sweet*, 322 A.2d at 365.

248. The writ of habeas corpus is codified at 42 Pa. Consol. State. §§ 6501-6505 (West 1998).

249. *Commonwealth v. Chester*, 733 A.2d 1242 (Pa. 1999); *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999); *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998).

250. *See e.g. Peterkin*, 722 A.2d at 639; *Chester*, 733 A.2d at 1251; *Fahy*, 737 A.2d at 233-34.

251. *See e.g. Peterkin*, 722 A.2d at 640; *Fahy*, 737 A.2d at 223.

252. *See e.g. Lantzy*, 736 A.2d at 568; *Chester*, 733 A.2d at 1248.

253. *See* Act of Feb. 18, 1785, 2 Sm. L. 275.

254. *See* Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 112 (1907).

255. *Williamson v. Lewis*, 39 Pa. 9, 29 (1861). *See also Fair*, 146 A.2d at 843 ("The common law writ is even more extensive in its scope than that authorized by the Habeas Corpus Act . . . .").

256. *Commonwealth v. Gibbons*, 9 Pa. Super. 527, 533 (1899), *aff'd, sub nom. In re Kelly*, 50 A. 248 (Pa. 1901). For a summary of early decisions discussing the relationship between the common law and statutory forms of habeas corpus, see William R. Klaus, *The Pennsylvania Habeas Corpus Act of 1951*, 26 Temp. L.Q. 32 (1952-53).

257. For an overview of the history of habeas corpus in Pennsylvania, see Elizabeth L. Green, Student Author, *Habeas Corpus and the 1966 Post Conviction Hearing Act*, 39 Temp. L.Q. 188, 190-93 (1966).

258. *Commonwealth ex rel. Stevens v. Myers*, 213 A.2d 613, 623 (Pa. 1965).

has a much broader scope"[259] than statutory habeas corpus. The court noted that because the common law form of the writ was not "frozen into [the habeas corpus] statute" it is "moldable to the exigencies of the times . . . ."[260]

In enacting the PCHA,[261] the predecessor of the current PCRA, the legislature provided that the post-conviction procedures under the PCHA "shall encompass all common law and statutory procedures . . . including habeas corpus . . . ."[262] In construing this provision, the Pennsylvania Supreme Court described the remedies under the PCHA as "derivative" of those under habeas corpus and noted that the writ of habeas corpus "was always available in the lower courts."[263] In another decision, the Court held that the PCRA did not "abolish the common law remedy of habeas corpus" and that "[a]ll claims previously cognizable on a common law writ, in circumstances not covered by the terms of the PCRA, may be litigated by means of the common law writ."[264]

Following the enactment of the PCHA, the legislature amended the habeas corpus statute to provide that habeas corpus relief was not available if "a remedy may be had by post conviction hearing proceedings . . . ."[265] When the PCHA was amended and renamed the PCRA in 1988, the PCRA again specifically addressed the status of habeas corpus. Section 9542 of the PCRA provides that the remedy under the PCRA "shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies . . . including habeas corpus."[266] Prior to the 1995 amendments, in the few cases where defendants sought post-conviction relief in the form of habeas corpus, the Superior Court affirmed the denial of habeas corpus relief holding that the issues raised "could have been considered . . . in the regular course of appellate review or by post conviction proceedings"[267] and, therefore, relief was not available under the "statutory remedy"[268] of habeas corpus. Because post-conviction relief prior to 1995 was not subject to a time-for-filing requirement, the issue of whether habeas corpus relief was available when post-conviction relief was time barred did not arise.[269]

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259. *Id.*

260. *Id.*

261. *See* Act of Jan. 25, 1966, P.L. (1965) 1580, 19 Pa. Consol. Stat. §§ 1180-1 - 1180-14, *recodified*, 42 Pa. Consol. Stat. §§ 9541-9551 (repealed 1988).

262. 42 Pa. Consol. Stat. § 9542 (repealed 1988).

263. *Commonwealth v. Lesko*, 501 A.2d 200, 204 (Pa. 1985).

264. *Commonwealth v. Sheehan*, 285 A.2d 465, 467 (Pa. 1971).

265. 42 Pa. Consol. Stat. § 6503(b) (West 1990).

266. 42 Pa. Consol. Stat. § 9542 (West 1998).

267. *Commonwealth v. McNeil*, 665 A.2d 1247, 1250 (Pa. Super. 1995); *Commonwealth v. Wolfe*, 605 A.2d 1271, 1273 (Pa. Super. 1992).

268. *Id.* at 1273.

269. The PCRA did not impose a time limit on filing for post-conviction relief. *Commonwealth v. Weddington*, 522 A.2d 1050, 1052 (Pa. 1987) (dismissal of petition solely on basis of delay was improper as legislature left period for obtaining PCHA relief unbounded). Under the PCRA, prior to the 1995 Amendments, a court, pursuant to § 9543(b), could dismiss a petition if, because of delay in the filing of the petition the prosecution had been prejudicial in its

The enactment of the 1995 amendments to the post-conviction relief required for the first time that a post-conviction relief petition be filed within a year of the date the petitioner's judgment becomes final.[270] A post-conviction relief could now be denied as time barred; the question of whether a defendant was likewise barred from seeking habeas corpus relief was addressed by the Pennsylvania Supreme Court in *Peterkin*.[271] *Peterkin* involved a second post-conviction relief petition seeking both collateral and habeas corpus relief filed ten years after defendant's conviction of two counts of first-degree murder became final. On appeal from dismissal of the petition as premature because of the pendency of litigation in federal court, the Commonwealth argued that the trial court had no jurisdiction to hear the petition because it was not timely filed. On the basis of the dual status of his petition, Peterkin asserted that because habeas corpus is constitutionally guaranteed, habeas corpus is not limited by the PCRA and the PCRA's time-for-filing provision unconstitutionally limited his right to habeas corpus relief.[272] In affirming the dismissal of the petition as untimely under the PCRA, the Court initially concluded, as noted earlier, that the one-year filing period is jurisdictional. Holding that the writ of habeas corpus continues to exist "only in cases in which there is no remedy under the PCRA,"[273] the Court concluded that Peterkin's claims were cognizable under the PCRA and, therefore, even though the claims were time barred, habeas corpus was not available as a remedy.[274] With respect to Peterkin's argument that the time-for-filing provision of the PCRA acts as a suspension of the constitutional right to habeas corpus review, the Court noted that the instant petition was his second petition.[275] Because he had access to habeas corpus relief through his first PCRA petition, his suspension claim was without merit.[276] Finally, the Court rejected Peterkin's argument that the time-for-filing provision of the PCRA unconstitutionally limits his right to habeas corpus relief.[277] Holding that the legislature may impose reasonable restrictions on constitutional rights without violating the right in question, the Court relied upon its 1879 holding in *Sayres v. Commonwealth*[278] that upheld the constitutionality of a statute that required defendants to seek a writ of error within twenty days of sentence.[279] The Court in *Peterkin* concluded that because the one-year filing period under the PCRA was "sufficiently generous" to permit preparation of even complex cases and because the

ability to respond to the petition or in its ability to retry the defendant if relief was otherwise available to the defendant. *See e.g. Commonwealth v. McGriff*, 638 A.2d 1032 (Pa. Super. 1994); *Commonwealth v. Weinder*, 577 A.2d 1364 (Pa. Super. 1990).

270. *See* 42 Pa. Consol. Stat. § 9545(b) (West 1998).

271. *See Peterken*, 722 A.2d at 639.

272. *See id.* at 641.

273. *Id.* at 640.

274. *Id.*

275. *Id.* at 641.

276. *Id.*

277. *Id.*

278. 88 Pa. 291 (1879).

279. *See Peterkin*, 772 A.2d at 642.

statute provided exceptions to the required filing period, the time limits in the PCRA did not "unreasonably or unconstitutionally limit [the] constitutional right to habeas corpus relief."[280]

While *Peterkin* was not the ideal case to claim that the time-for-filing provision of the PCRA unconstitutionally suspends or limits habeas corpus review because the issue was presented in the context of a second petition, it is clear the Court would have reached the same conclusion if *Peterkin* had appealed from the dismissal of an untimely filed first PCRA petition without regard to why the petition was not timely filed.[281] Noting that with the enactment of the 1995 amendments, the legislature established a scheme in which "PCRA petitions are to be accorded finality," the Court held that a defendant does not have a post-conviction remedy for claims that are cognizable under the PCRA if a PCRA petition is not timely filed.[282] That a court has no jurisdiction to consider an untimely petition does not, the Court held, unconstitutionally limit or suspend habeas corpus relief.[283]

Several aspects of the *Peterkin* decision merit comment. First, in relying on *Sayres* for its holding that the time limits under the PCRA do not unconstitutionally suspend habeas corpus, the Court in *Peterkin* disregarded a significant difference between the time-for-filing requirement under the PCRA and the statute in question in *Sayres*. In *Peterkin*, the Court stated that the one-year filing period under the PCRA is jurisdictional and not subject to equitable tolling.[284] However, the statute in *Sayres* was a statute of limitations, and the crux of the Court's holding was that any time limit must be reasonable.[285]

That the Court in *Sayres* had authority to consider an untimely writ supports the argument that as a limit on the court's jurisdiction, the one-year filing period under the PCRA unconstitutionally suspends the writ of habeas corpus. Time limitations are not "reasonable restrictions"[286] on a defendant's right to habeas corpus relief if a court is without power to consider an untimely post-conviction petition where the defendant asserts that extraordinary circumstances made it impossible to file the petition on time.[287] Because a court under *Peterkin* has no power to consider an untimely petition, in enacting the time-for-filing provision in the PCRA, the legislature has "so hampered" the right to habeas corpus "as to amount to a practical deprivation" of the right.[288]

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280. *Id.* at 643.

281. *See id.* at 642. Peterkin did not meet any of the exceptions to the one-year filing requirement. *Id.*

282. *Id.*

283. *Id.* at 643.

284. *Id.* at 641.

285. *See Sayres*, 88 Pa. at 309.

286. *Peterkin*, 722 A.2d at 642.

287. *See Commonwealth v. Weddington*, 522 A.2d 1050, 1052 (Pa. 1987) (reversing dismissal of PCHA petition as untimely but noting in *dictum* that time limitations on the filing for post-conviction relief "would be workable in this Commonwealth so long as due process is served by writs such as habeas corpus and coram nobis").

288. *Commonwealth v. Reifsteck*, 115 A. 130, 132 (Pa. 1921).

Second, while the decision in *Peterkin* holds that the PCRA subsumes the remedy of habeas corpus where relief is available under the PCRA, there is no discussion in *Peterkin* of the long history of common law habeas corpus and the role of the Pennsylvania Supreme Court in shaping the writ.[289] Nor is there a discussion of the issue in *Commonwealth v. Ahlborn*,[290] a pre-*Peterkin* decision holding that unlike the PCHA, the PCRA "supersedes"[291] the common law writ of habeas corpus. As noted, prior decisions have held that common law habeas corpus is "an implied common-law power"[292] not created by the habeas corpus statute, and that the Court had the authority to "mould"[293] habeas corpus to address the "exigencies"[294] of any particular case[295] and the "power to delineate the conditions under which [the] writ of habeas corpus can be used in challenging criminal convictions."[296] If *Peterkin* and *Ahlborn* mean that courts have no authority, outside that conferred by the legislature, to grant habeas corpus relief where, for example, exceptional circumstances prevent a defendant from filing a timely post-conviction petition, the court has significantly altered the historical role Pennsylvania courts have played in "[continuing] to make ... the protections [of habeas corpus] available."[297]

Finally, and perhaps not surprisingly, the Court in *Peterkin* makes no reference to how the federal courts have ruled in cases where the one-year filing period governing federal habeas corpus has been challenged as unconstitutionally suspending habeas corpus. Like Pennsylvania, Congress in 1996 enacted a one-year limitation period on the filing of petitions seeking federal habeas corpus relief.[298] To date, circuit courts that have specifically addressed the issue have held that because the one-year limitation period acts as a statute of limitation subject to equitable tolling, the one-year limitation does not render the habeas corpus remedy "inadequate or ineffective"[299] and, therefore, the time-for-filing requirement does not

289. *Peterkin* refers only the statutory form of the writ. In *Peterkin*, the Court responded to the claim that because of the continued existence of the habeas corpus statute after the PCRA was enacted, an action for habeas corpus relief is not limited by the PCRA. The court stated that it "agree[d] that the legislature intended that the writ would continue to exist as a separate remedy. However, as the statute itself provides, the writ continues to exist only in cases in which there is no remedy under the PCRA." *Peterkin*, 722 A.2d at 640.

290. 699 A.2d 718 (Pa. 1997). In *Ahlborn*, the court held that the defendant was not entitled to PCRA relief because he had finished serving the sentence imposed before the court adjudicated the issues presented in his petition.

291. *Id.* at 721.

292. *Gibbons*, 9 Pa. Super. at 533, *aff'd sub nom., In re Kelly*, 50 A. 248; *Fair*, 146 A.2d at 846.

293. *Gosline v. Place*, 32 Pa. 520, 524 (1859); *Myers*, 213 A.2d at 623.

294. *Myers*, 213 A.2d at 623.

295. *Id.* at 622.

296. *Id.*

297. *Stander v. Kelley*, 250 A.2d 474, 485 (Pa. 1969) (Roberts, J., concurring).

298. *See* 28 U.S.C. § 2244(d)(1) (1999).

299. *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (stating that "substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute suspension of the writ of habeas corpus"); *Rosa v. Senkowski*, No. 97 Civ. 2468(RWS), 1997 WL 436484 (S.D.N.Y. Aug. 1, 1997); 1997 WL 436484 (S.D.N.Y. Nov 17,

suspend the writ.[300] Because the federal and Pennsylvania constitutional provisions are identical, the federal cases lend strong support to the argument that because the Pennsylvania time for filing provision is a "jurisdictional law not subject to equitable tolling,"[301] Pennsylvania's one-year filing period unreasonably limits the availability of the writ in violation of the Pennsylvania Constitution.[302]

CONCLUSION

While the Pennsylvania Supreme Court's recent decisions have expanded the scope of the PCRA, the Court has also limited collateral relief by construing the time-for-filing provision of the Act as jurisdictional[303] and holding that habeas corpus relief is not available if the claim could have been presented in a PCRA petition.[304] The Court's decision in *Kimball* broadens the availability of post-conviction relief by rejecting an interpretation of the PCRA as requiring a defendant seeking collateral relief on grounds of ineffectiveness to meet a more demanding prejudice standard than governs ineffectiveness claims on direct appeal.[305] In holding that there is a unitary standard governing the review of ineffectiveness claims, *Kimball* equates a defendant's showing that the outcome of the proceeding would have been different but for counsel's actions with the conclusion that the proceeding resulted in an unreliable adjudication of guilt. The conclusion is at odds with post-*Strickland* United States Supreme Court decisions holding that, with respect to certain types of lawyer error, the proceeding is reliable even though the outcome of the proceeding would have been different but for the lawyer's conduct. As a result, the standard for evaluating claims of ineffectiveness of counsel in Pennsylvania is arguably less demanding than the *Strickland* standard.[306] Thus, it is in conflict with the Pennsylvania Supreme Court's conclusion in *Pierce* that the Pennsylvania standard for ineffectiveness claims is identical to the standard set forth in *Strickland.*[307]

The Court further expanded relief under the PCRA by holding that counsel's performance on direct appeal is cognizable under the Act and that a defendant has an enforceable right to effective counsel in a first PCRA proceeding.[308] Both decisions lend support to the argument that a defendant

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1997).

300. *See Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir. 1999). *See also Rodriguez v. Artuz*, 990 F. Supp. 275 (S.D.N.Y. 1998), *aff'd*, 161 F.3d 763 (2d Cir. 1998). *But see Rosa v. Senkowski*, No. 97 Civ. 2468, 1997 WL 436484 (S.D.N.Y. 1997) *opinion modified*, 1997 WL 724559 (S.D.N.Y. 1997), *aff'd on other grounds*, 148 F.3d 134 (2d Cir. 1998).

301. *See Fahy*, 737 A.2d at 222.

302. *See* Pa. Const. art. I, § 14.

303. *See Fahy*, 737 A.2d at 222.

304. *See Peterkin*, 722 A.2d at 641.

305. *See Kimball*, 724 A.2d at 332.

306. *See Strickland*, 466 U.S. at 687.

307. *See Pierce*, 527 A.2d at 976.

308. *See Peterkin*, 722 A.2d 638.

is entitled to a PCRA remedy where counsel's ineffectiveness causes a defendant to lose the right to discretionary review. The need for a state court remedy has been made more compelling by the Supreme Court's recent decision holding that a defendant must exhaust all state court avenues of relief before seeking federal habeas corpus review.[309]

While the Court has expanded the type of claims that can be raised in a PCRA proceeding by interpreting the PCRA's one-year time-for-filing requirement as jurisdictional and not subject to equitable tolling, it has significantly limited the availability of collateral relief.[310] Neither the language, structure, nor legislative history of the 1995 amendments to the PCRA suggest that the legislature intended the filing period to act as a jurisdictional bar. Such a construction of the filing period is inconsistent with the fact that the PCRA places responsibility upon incarcerated, indigent defendants to prepare and timely file petitions seeking post-conviction relief. Even as a limit on a court's jurisdiction, the one-year filing period should be excused under the *nunc pro tunc* doctrine where extraordinary circumstances prevent incarcerated defendants from complying with the filing period.

Finally, the Court's holding in *Peterkin* that the one-year time-for-filing provision does not unconstitutionally suspend habeas corpus[311] finds no support in the Court's prior habeas corpus decisions or case law construing legislative restrictions on constitutionally guaranteed rights. Because a court does not have authority to consider the reasons that made it impossible for a defendant to file a timely petition, the PCRA's time-for-filing provision unconstitutionally restricts habeas corpus relief.

309. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). This issue may be moot in light of the Pennsylvania Supreme Court's recent order issued after this article was prepared for publication, declaring that a defendant is not required to seek allowance of appeal in order to be deemed to have exhausted all available state remedies for purposes of federal *habeas corpus* review. *In re Exhaustion of State Remedies in Criminal and Post Conviction Relief Cases*, No. 218 Judicial Admin. Docket No. 1 (Pa. May 9, 2000).

310. *See supra* nn. 290-91.

311. *See Peterkin*, 722 A.2d at 643.